HON'BLE SRI JUSTICE P.S.NARAYANA

WRIT PETITION No.3605 of 2005

Date: October 9, 2007

Between:
A.P.Kerosene Wholesale Dealers
Fedaration (Regd. No.767/87),
Trunk Road, Khammam,
Rep. by its President J.Hanumanth
Prasad. … Petitioner.

And

1. The Government of Andhra Pradesh,
   Rep. by its Ex.Officio Secretary,
   Consumer Affairs, Food and Civil
   Supplies (CS.III) Department. Secretariat-22,
   Hyderabad and 2 others. … Respondents.

* * *

ORDER:

Heard Sri N.Subba Reddy, learned senior counsel representing the writ petitioner, learned Government Pleader for Civil Supplies and the learned Assistant Solicitor General.

2. Learned senior counsel Sri N.Subba Reddy had taken this Court through the contents of the affidavit filed in support of the writ petition, the counter-affidavit as well and would contend that the impugned G.O. cannot be sustained at all since the same is illegal, arbitrary and also unjust. The counsel also further would maintain that even if this Court is inclined to negative the contentions of the writ petitioner since a representation is pending before the third

respondent, since third respondent is competent to take a decision in this matter, let the third respondent dispose of the said representation in accordance with law at an early date.

3. The learned Government Pleader for Civil Supplies had taken this Court through the contents of the counter-affidavit and would maintain that in the light of the facts and circumstances in view of the interim order made by this Court, the State Government is incurring heavy loss and hence the writ petition be dismissed.

4. The writ petition is filed for a writ of *Mandamus* declaring the order of the first respondent issued in G.O.Ms.No.19, Consumer Affairs, Food and Civil Supplies (CS.III) Department., dated 04.02.2005, as illegal, arbitrary and unjust and consequently direct the respondents to continue to allow one percent per kilo liter towards leakage and shortage in kerosene oil to the members of the petitioner federation, which system is in vogue since 30 years and pass such other suitable orders.

5. The General Secretary of A.P. Kerosene Wholesale Dealers Federation had sworn to the affidavit filed in support of the writ petition wherein G.O.Ms.No.19, Consumer Affairs, Food and Civil Supplies (CS.III) Department, dated 04.02.2005 had been challenged. It is stated that the Government of India had put kerosene under the Essential Commodities Act, 1955, as about 94% of kerosene sold was used for domestic cooking and lighting purposes largely by the poorer

households and was made available for domestic sector at subsidized price through public distribution system. Kerosene was being marketed at the wholesale point through the dealers of public sector oil companies and onward retail distribution of kerosene to consumers was carried out by fair price shops and authorized retailers (hawkers) appointed by the State Governments. The area of operation of wholesale dealers was limited to fair price shops and authorized retailers attached to them by the district administration. Commission for wholesale dealer was fixed by the Government of India, while the final wholesale and retail selling prices were fixed by the State Governments after considering other elements of costs, such as freight, leakage, barrel depreciation, shrinkage allowances wherever applicable and other incidental expenses. It is stated that during All India Sample Study of 1996, the actual percentage of leakage as ascertained from the dealers' books was 0.23%, which worked out to Rs.11.96 per K.L. However, the report submitted by the Tariff Commission appointed by the Government of India in September 2003, on kerosene dealers commission recommended that the weighted average of actual loss of kerosene was 0.42%. It was further observed by the commission that the said loss was restricted to 0.23% in the 1997 report and also subsequently. But the said recommendation had not been implemented so far by the Government of India and the average arrived at 0.23% in the year 1997 was still continuing in fixation of the commission of the kerosene dealers. It is also further averred that the first respondent Government issued orders

in Government Memo No.1036/CS.IV/76-1, dated 29.05.1976 fixing the margin to be allowed to wholesale and retail dealers of kerosene at 1% per K.L. towards leakage and shortage of kerosene. It was also classified by the second respondent by his letter dated 10.6.1982 that the time of the stock check, variation between actual stock and book stocks can be to the extent of 1% of the actual receipts since last checked, when the storage was return off by the dealers. The provision of 1% in the rate was only to cover any shortage in handling and leakage. The provision of 1% allowance extended to the kerosene wholesale dealers in the actual receipts only to cover any shortage in handling/leakage while receiving supplies and while making deliveries to retailers. Again in the year 1997, the second respondent issued a circular bearing CCS & CA.Ref.No.E2/800/95, dated 10.7.1997 inviting the attention of the District Collectors and Vigilance Authorities about the clarification given by the State Level Coordinator for petroleum industry about the provision of 1% allowance extended to the kerosene wholesale dealers in the actual receipts was to cover any shortage in handling/leakage while receiving supplies and while making deliveries to retailers. The said circular made it abundantly clear that the actual quantity due to leakage and handling was allowable up to a limit of 1% as per the directions given by the oil industry. It was needless to mention that 1% leakage and shortage allowance was being given to wholesale kerosene dealers since 1976 onwards as can be seen from the

impugned order. Under the public distribution system, the supply of kerosene had to reach the consumer quickly, who resides even in a remote area, at the rates fixed by the Government. In pursuance of this, the practice of the retailer going to the wholesaler and taking the stock of kerosene was given up and in that place the wholesaler was directed to go to the place of the retailer and deliver the kerosene as per the allotment made by the Civil Supplies Department. In that process, there would be leakage and shortage of kerosene oil and as such this 1% allowance was given to the wholesale dealers. The same was being allowed with regard to other petroleum products such as MS and HSD. It is also averred that while that being so, the first respondent issued the impugned G.O. whereunder the earlier order of allowing 1% per KL towards leakage/shortage in kerosene oil to the wholesale kerosene oil dealers had been withdrawn and the wholesale kerosene dealers were directed to account for the entire stock of kerosene oil being drawn from kerosene oil depot for delivering to the retailers as per the allotment order issued by the District Collectors. A reading of the impugned G.O. reveals that the government thought it fit to withdraw the 1% allowance per KL towards leakage/shortage of kerosene oil on the ground that an amount of Rs.19.03 was already included in the commission by the Government of India to the wholesale dealers. It is also stated that the first respondent Government failed to consider that the amount of Rs.19.03 paise included in the commission of wholesale dealer would not compensate the entire 1% leakage/shortage of the product. Since the

wholesale dealers were not receiving the 1% out of the total product, the Government of India had been compensating only 0.23%, which comes to Rs.19.03 paise and it cannot be a ground for withdrawing the 1% allowance to the dealers and asking them to account for the 100% product, which was not being received by the dealers. The assumption of the first respondent that 1% leakage allowance was in addition to Rs.19.03 was wrong and in fact it was a part of 1% leakage/shortage allowance. The reasoning given by the first respondent in issuing the impugned G.O. is unsustainable and contrary to the spirit. It is further stated that the commission fixed was inclusive of a component of operating stock loss of 0.23% is incorrect. The petitioner had given representations to the respondents 1 and 2 requesting to withdraw the impugned G.O. on 05.02.2005 itself, but no positive action has been received so far. In such circumstances the petitioner approached this Court by filing the present writ petition.

6. The said G.O.Ms.No.19 referred to supra reads as hereunder:

"GOVERNMENT OF ANDHRA PRADESH
ABSTRACT

CIVIL SUPPLIES- Kerosene oil- Leakage/Shortage of Kerosene oil- Orders- Issued.

CONSUMER AFFAIRS FOOD AND CIVIL SUPPLIES (CS.III) DEPARTMENT

G.O.Ms.No.19 Dated 04.2.2005
Read the following

1. Govt. Memo.No.1036/CS.IV/76-I, Food & Agriculture Department dated 29.05.1976.

2. Govt. Memo.No.45900/CS.IV/80-I, Food & Agriculture Department dated 20.12.1980.
3. Commissioner of Civil Supplies & Consumer Affairs, Ref.No.E2/800/95, dated 10.07.1997.
4. From the Under Secretary to Government of India, Ministry of Petroleum & Natural Gas, New Delhi, Lr.No. P-20028/2/2000-PP, dated 23.08.02.
5. From the Under Secretary to Government of India, Ministry of Petroleum & Natural Gas, New Delhi, Lr. No. P-20029/23/2003-PP, dated 09.10.03.
6. G.O.Ms.No.50, Consumer Affairs, Food & Civil Supplies Department., (CS.III) Department, dated 22.11.2002.

* * *

ORDER:

In the reference 1st and 2nd read above Government I have issued orders providing 1% per kilo liter towards leakage and shortage of kerosene oil in wholesale margins.

2. In the reference 3rd read above, instructions were issued that 1% per KL allowed towards leakage and shortage in kerosene should be accounted by the wholesale kerosene oil dealers periodically on month to month basis along with their monthly return with necessary remarks.

3. In the reference 4th read above, Government of India have provided in dealers commission an amount of Rs.19-03 per KL towards loss of stock. In the reference 5th read above, Government of India, Ministry of Petroleum & Natural Gas, New Delhi have clarified that the commission fixed is inclusive of a component of operating stock loss of 0.23%.

4. In the reference 6th read above, Government have issued orders revising the margins of wholesale kerosene dealers as fixed by the Government of India and an

amount of Rs.19-03 was provided towards loss of stock in wholesale kerosene dealers margins.

5. In view of the above, the Government have examined the issue of allowing 1% leakage to the wholesale kerosene dealers, when they are provided Rs.19.03 towards loss of stock. Thus there is no justification for allowing another 1% per KL towards shortage/leakage in addition to provide Rs.19.03 in the commission of the wholesale dealers for the same purpose. To prevent diversion of PDS kerosene in the black-market and to eliminate the adulteration in diesel, whereby, the State Government is loses huge revenue in the form of sales tax and the Government of India in the form of subsidy on PDS kerosene besides polluting the environment. These aspects are duly taken into account while examining the issue of allowing 1% of stocks to the kerosene wholesale dealers towards loss/leakages, which works out 6.216 KLs. Annually for the entire State on the basis of existing allocations.

6. Government after careful examination of the matter, hereby order that the orders issued allowing 1% per KL towards leakage/shortage in kerosene oil to the wholesale kerosene oil dealers is hereby withdrawn with immediate effect and the PDS wholesale kerosene dealers are directed to account for the entire stock of kerosene oil being drawn from K.Oil depot for delivering to the retailers/F.P. Shop dealers as per the allotment orders issued by the Collectors.

7. These orders will come into effect from the month of February 2005 allocations onwards.

(BY ORDER AND IN THE NAME OF THE GOVERNOR OF ANDHRA PRADESH)

BHANWAR LAL,
EX.OFFICIO SECRETARY TO GOVERNMENT."

7. The representation dated 05.02.2005 made by the petitioner federation to the second respondent also had been placed before this Court. Further representation made by the petitioner federation to the Secretary, Ministry of Petroleum & Natural Gas, Government of India, Shastri Bhavan, New Delhi, dated 15.12.2006 also is placed before this Court. The contents of these representations being self-explanatory, they need not be elaborated. G.O.Ms.No.50, dated 22.11.2002 of Consumer Affairs Food and Civil Supplies (CS.III) Department also had been placed before this Court. Certain circulars and instructions also had been relied upon.

8. This Court on 25.02.2005 granted *status quo* for a period of one week and on 03.3.2005 the said order of *status quo* was extended by one more week and on 11.3.2005, since no counter-affidavit had been filed, while issuing *rule nisi*, in W.P.M.P.No.4848 of 2005 the interim order of *status quo* granted earlier by this Court had been extended until further orders. Thus, the matter is coming up for final hearing. The stand taken by the writ petitioner in the affidavit filed in support of the writ petition and several relevant material papers placed before this Court already had been referred to above.

9. In the counter-affidavit filed, which was sworn by Deputy Director

(PDS), office of the Commissioner of Civil Supplies, Civil Supplies Bhavan, Somajiguda, Hyderabad, in reply to paras 3 and 4 it is averred in para 2 of the counter-affidavit that the Government of Andhra Pradesh, after considering various aspects including the rampant diversion of PDS kerosene for adulteration issued orders in G.O.Ms.No.19, CA, F & CS Department. On 04.02.2005 withdrawing 1% allowance per KL given to Kerosene wholesalers towards leakage and shortage of kerosene which was provided by the State Government vide Government Memos dated 29.5.76 and 20.12.80, the Government of India did not make any specific provisions in this regard. Subsequently, the Government of India in their letter No.P-20028/2/2000-PP, dated 23.8.02 have revised the Commission payable to Kerosene wholesale dealers to Rs.204.36 per KL wherein a provision for product leakage loss of 0.23 percent was made based on the following factors:-

During all India sample study of 1996, the actual percentage of leakage as ascertained from the dealers' books is 0.23%. Accordingly, the same had been taken into consideration while recommending the wholesale dealers' commission. The study was carried out considering various types of storage licenses and also for various slab wise sales volumes. The details are submitted hereunder:

Licence category-wise	As per 1996 study Stock Loss as % of sales
Form XIII	0.12
Form XV	0.32

Form XVIII	0.07
For all licences	0.23

Sales volume slab wise

Sales volume per month (KL)	
75 & below	0.16
76 – 125	0.15
126 – 200	0.28
Above 200	0.30
For all sales categories	0.23

In both the cases, product/leakage loss works out to 0.23%

Another point considered is that the average sales of dealer per month computed during 1997 as per de-novo study were 150 KL. This had marginally decreased to 149 KL in 2004 – 2005. Hence, the current average volume of kerosene handled by the dealer was almost at par with volume handled in 1997 and the oil industry did not find any justification in increasing the leakage percentage beyond the existing 0.23%. It is further stated that the tariff commission had also recommended 0.23% as product loss while fixing wholesale kerosene commission in 2003. While commenting on tariff commission report on SKO wholesale dealers' commission, oil industry had made the following observations:-

> "Industry members have examined the Tariff Commission Report dated 22.9.2003 and had observed that during the 1997 de-novo study, carried out by the Committee of Director (Marketing) of Oil companies had also initially considered a sample survey of SKO/LDO Dealers and collected the information based on the balance sheet of the dealers. However, on analysis of the various elements it was found that these were at variance with the actual reality in the market place. Therefore, the

> Committee had recommended Dealer Commission not based on the data collected through the reports but on a normative basis. It was felt that for various purposes like income tax etc., the balance sheets prepared by the wholesale dealers were at variance from the factual happening in the field."

Norms for MS & HSD for which provision had been made in the dealers commission is as below:

MS 0.59% & HSD : 0.18%

Moreover the permissible norms as per MS & HSD Control Order, 1998 are as under:

(i) Evaporation handling losses in motor spirit as follows:

0.75% on annual average sales of 0-600 kilo liters.
0.60% on annual average sales of above 600 kiloliters

(ii) Handling losses in High Speed Diesel as follows:-

0.25% on annual average sales of 0-600 kiloliters
0.20% on annual average sales of above 600 kiloliters.

In the circumstances it was stated that while calculating dealer commission for kerosene, the loss of product in manual and multiple handling of kerosene had been taken into account by providing compensation for the loss of 0.23% to a tune of Rs.19.03 per KL as part of the total commission of Rs.204.36 per KL. It is further stated that in order to prevent diversion of PDS kerosene into black-market and to eliminate adulteration of diesel with kerosene where by State Government looses huge revenue in the form of Sales Tax/VAT, the

Government of India in the form of subsidy on PDS kerosene i.e., Rs.10459 crores for the year

2004-05, besides seriously polluting the environment, Government of A.P., reviewed the entire situation, particularly, the distribution of PDS kerosene including the issue of allowing 1% leakage to the wholesale kerosene dealers since 1980 and felt that there was no justification for allowing 1% per KL allowance towards shortage/leakage in addition to Rs.19.03 provided under margins for the same purpose. In the circumstances Government of A.P. issued orders in G.O.Ms.No.19, CA F & CS Department Dt.04.02.2005 withdrawing the 1% per KL towards leakage/shortage in kerosene oil to wholesale kerosene dealers with immediate effect and these orders were perfectly in order and also concurred by the Government of India vide their letter dated 28.6.05. In reply to paras 5 and 6 it is averred that Government of Andhra Pradesh though fixed the margins to be allowed to wholesale dealers in Government Memo.No.1036/CS.IV/76-1, dt.29.05.1976 at 1% per KL towards leakage/shortage while receiving supplies and making deliveries to retailers, the loss of stock was kept in view while fixing the margins from time to time basing on the guidelines issued by the Government of India at that time. During the year 2002, the Government of India, Ministry of Petroleum and Natural Gas vide their letter No.P-20028/2/2000-PP, dated 23.8.2002 communicated the revised commission for kerosene wholesale dealers, wherein Rs.19.03 per KL was provided towards stock loss as a part of the total commission of Rs.204.36 per KL. This fact had been further clarified

by the Government of India vide their letter No.P-20028/23/2003-PP, dated 09.10.03 that there was no need for a separate allowance for leakage. Thus, the 1% allowance was withdrawn vide G.O.Ms.No.19, CA, F & CS Department., dated 04.02.2005. It is also stated that the Government of Andhra Pradesh had also taken serious steps to implement the "Delivered Supply System" for kerosene which was in vogue in the entire country since 01-01-1994, so as to eradicate the problem of en-route diversion and to reduce the cost of transportation of kerosene from oil depot to wholesale point, resulting in reduction in end consumer price. In fact, under the "Delivered Supply Scheme" the delivery of PDS Kerosene was effected by the Oil Marketing Company through its dedicated fleet to the underground tank of the wholesale dealer, hence, there was no question of any leakage/loss of product in transit. It is further stated that a writ petition W.P.No.2511/94 filed against the "Delivered Supply Scheme" by the A.P. PDS Kerosene Oil wholesale Dealers Federation had been dismissed by this court by judgment dated 21.3.2003. The G.O.I. had also issued orders vide their Lr.No.P-17011/2/2005-Mkt, dated 25.5.05 to implement the Delivered Supply Scheme with lot of improvement/investment by the oil companies for PDS kerosene oil through selected (86) wholesale dealers in the State of A.P. w.e.f. 02.10.05. The policy of the government and measures adopted in implementing the policy of the Government cannot be questioned by A.P. Wholesale Dealers Federation, and they were not entitled to claim double benefits under

the scheme and while calculating the dealer's commission for PDS kerosene, i.e., Rs.204.36 per KL, the loss of stocks in manual and multiple handling of kerosene had already been taken into account.

10. While answering the averments made in paras 7 to 10 of the affidavit filed in support of the writ petition it is stated that continuation of allowing 1% per KL, towards leakage and shortage in kerosene oil to the members of the petitioner's federation, which system was in vogue since 30 years was not tenable and as such the suspension of the operation of the orders issued in G.O.Ms.No.19, CA, F & CS Department., dated 04.02.05 does not arise. There are no merits in the writ petition and the same is liable to be dismissed.

11. In the light of the respective stands taken by the parties inasmuch as the reasons as to why the impugned G.O. had been issued are well explained in the counter-affidavit, this Court is of the considered opinion that there are no tenable grounds raised by the writ petitioner and it is needless to say that in the light of the same, the writ petition being devoid of merits the same shall stand dismissed. However, since it is stated that the representation dated 15.12.2006 is said to be pending before the third respondent, let the third respondent dispose of the said representation in accordance with law within a period of four weeks from the date of receipt of a copy of this order. It is needless to say that the writ petition is dismissed subject to the above direction. No order as to costs.

(P.S.NARAYANA, J)

Date: October 9, 2007
BSB